Supreme Court, U. S.
FILED
SEP 5 1979
JR., CLERK

No. 78-1900

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OCTOBER TERM, 1978

WILLIAM R. SMYER AND BRYON R. MAY, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 596 F. 2d 939. The opinion of the district court (Pet. App. B) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on April 2, 1979. A petition for rehearing was denied on April 30, 1979. The petition for a writ of certiorari was filed on June 1, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the American Antiquities Act, 16 U.S.C. 433, is unconstitutionally vague as applied to the excavation and appropriation of 800-year old artifacts of a prehistoric Indian civilization.

2. Whether petitioners were denied their right to a jury trial.

3. Whether certain statements and physical evidence were improperly withheld from petitioners before trial or improperly admitted at trial.

STATUTE INVOLVED

The American Antiquities Act, 16 U.S.C. 433, provides:

> Any person who shall appropriate, excavate, injure, or destroy any historic or prehistoric ruin or monument, or any object of antiquity, situated on lands owned or controlled by the Government of the United States, without the permission of the Secretary of the Department of the Government having jurisdiction over the lands on which said antiquities are situated, shall, upon conviction, be fined a sum of not more than $500 or be imprisoned for a period of not more than ninety days, or shall suffer both fine and imprisonment, in the discretion of the court.

STATEMENT

After a jury-waived trial in the United States District Court for the District of New Mexico, petitioners were convicted on 11 counts of unlawful excavation of a prehistoric site and theft of specific objects of antiquity, in violation of the American Antiquities Act, 16 U.S.C. 433. Petitioners were sentenced to concurrent terms of 90 days' imprisonment on each count. The court of appeals affirmed (Pet. App. A1 to A7).

The evidence at trial showed that in October 1977 officers of the United States Forest Service stationed in the Gila National Forest, New Mexico, noticed signs of recent digging at a prehistoric Mimbres ruin. On October 29, 1977, an officer noticed new tire tracks leading past a Forest Service Antiquities Act sign to archaeological sites 250 and 251 (Tr. 24, 79, 117). Freshly dug holes and digging tools were found at one of the sites (Tr. 33-34, 81-83), and a pick-up truck whose tire tracks matched those seen entering the area was found in an arroyo between the two sites (Tr. 36, 116). The truck was registered to petitioner May (Tr. 40, 90, 117).

On the following day, May was interviewed by a special agent of the Forest Service. After signing a waiver of rights form (Tr. 92), May admitted that he and petitioner Smyer had been digging for artifacts at the sites and offered to return bowls which they had taken from the area (Tr. 92-94). The two men then proceeded to Smyer's house, where May gave the officer certain artifacts uncovered at the site (Tr. 94-96, Gov't Exhs. 13A-H). Smyer, after being informed of his rights, admitted that he had dug for artifacts at the site with May (Tr. 100). A subsequent warrant-authorized search of Smyer's house uncovered 31 Mimbres bowls (Tr. 102). The recovered artifacts were estimated to date from 1000-1200 A.D. and to have a wholesale value of at least $1,000 each (Tr. 129-131, 138).

In his defense, May admitted that he excavated the artifacts but contended that he was unaware that the area was federal property (Tr. 181-182, 187, 188). Petitioner Smyer did not take the stand.

ARGUMENT

1. Petitioners argue (Pet. 6) that the American Antiquities Act, 16 U.S.C. 433, is unconstitutionally

vague because it fails to define the term "object of antiquity." Whatever merit this claim might have in other situations, it has no force in this case.

As both the district court and the court of appeals noted, a statute that is impermissibly vague as applied in some contexts may nonetheless provide fair warning that other conduct falls within its scope (Pet. App. A3-A4, B2 to B5). Where, as here, the statute does not broadly trench upon First Amendment freedoms, "one to whom application of [the] statute is constitutional will not be heard to attack the statute on the ground that impliedly it might be also taken as applying to other persons or other situations in which its application might be unconstitutional." *United States* v. *Raines*, 362 U.S. 17, 21 (1960). See also *United States* v. *Powell*, 423 U.S. 87 (1975); *United States* v. *Mazurie*, 419 U.S. 544, 550 (1975); *United States* v. *National Dairy Products Corp.*, 372 U.S. 29, 32-33 (1963).

These settled principles govern here, for it is beyond question that an 800-year old archaeological artifact, created by a prehistoric civilization, is an "object of antiquity" within the meaning of the statute. The statute thus gave fair warning of its clear intent to forbid the excavation and appropriation of the objects taken by petitioners in this case.[1] Even if the statute was vague as

[1]The history of the statute further demonstrates Congress' intent to protect these artifacts from plunder and destruction. "[I]n view of the fact that the historic and prehistoric ruins and monuments on the public lands of the United States are rapidly being destroyed by parties who are gathering them as relics and for the use of museums, and colleges, etc., your committee are of the opinion that their preservation is of great importance." S. Rep. No. 3797, 59th Cong., 1st Sess. (1906). See also comments by Rep. Lacey, 40 Cong. Rec. 7888 (1906), stating that the purpose of the bill "is to preserve these old objects of special interest and the Indian remains in the pueblos of the Southwest * * *."

applied to the excavation of less ancient objects of less significant cultural origin, the statute provided ample notice that the conduct charged in this case was unlawful. See *Morissette* v. *United States*, 342 U.S. 246 (1952); *United States* v. *Mazurie*, *supra*, 419 U.S. at 551-553.

United States v. *Diaz*, 499 F. 2d 113 (9th Cir. 1974), on which petitioners rely (Pet. 6), is distinguishable on this very basis. In *Diaz*, the defendant was charged with appropriating Indian face masks that were only three or four years old at the time of the theft. The court of appeals could have reversed the conviction in *Diaz* simply on the ground that objects only four years old are not "objects of antiquity" under any reasonable interpretation of the statute.[2] Instead, although the constitutionality of the statute was neither briefed nor argued on appeal, the court held that the statute failed to afford notice of its application to objects of such recent origin and was therefore "fatally vague * * *." *Id.* at 115. In ruling as it did, the court of appeals in *Diaz* violated the fundamental principle that a court should "never anticipate a question of constitutional law in advance of the necessity of deciding it * * *." *Liverpool, New York, & Philadelphia Steamship Co.* v. *Commissioners of Immigration*, 113 U.S. 33, 39 (1885). See also *United States* v. *Raines*, *supra*, 362 U.S. at 21. Moreover, the decision antedated this Court's reversal of a similar decision by another panel of the Ninth Circuit in *United States* v. *Powell*, *supra*. Thus, there is little reason to suppose that the approach taken in *Diaz* would be perpetuated by the Ninth Circuit if it were confronted with the same issue again today. At most, therefore, *Diaz*

[2]The government contended in *Diaz* that the face masks were "objects of antiquity" because they "related to religious or social traditions of long standing." 499 F. 2d at 114.

stands as a ruling that the statute is unconstitutionally vague as applied to objects of recent origin, a holding not in conflict with the decision in this case. There is no basis for concluding that, because the statute does not fairly warn that a four-year old object is an "antiquity," the statute is similarly vague as applied to the 800-year old archaeological artifacts stolen in this case.[3]

2. Petitioners' case was originally set for trial in Albuquerque, New Mexico. Prior to trial, however, petitioners requested as a matter of convenience that the trial be held in Las Cruces, New Mexico, instead. The district court agreed to transfer the trial to Las Cruces but informed the defendants that a jury would not be available there on the scheduled trial date. Petitioners chose to have the trial in Las Cruces on the scheduled date anyway, and they therefore signed jury-trial waivers that were approved by the court (Pet. App. A5).

Petitioners now contend (Pet. 6-7) that they were denied the right to a jury trial. The court of appeals correctly concluded, however, that this "record shows that the waivers were made knowingly, voluntarily and with the approval of competent counsel" (Pet. App. A5). Petitioners chose to waive their right to a jury trial to obtain the perceived advantage of going to trial in Las Cruces on the scheduled trial date.

Nor were petitioners entitled by law to have their trial in Las Cruces rather than Albuquerque. Rule 18 of the

[3]We note, moreover, that Congress has before it legislation (the "Archaeological Resources Protection Act of 1979") that will specifiy the age of archaelogical resources covered by the Antiquities Act. The House version limits its application to objects at least 100 years of age (H.R. 1825), while the Senate version would apply to any item at least 50 years of age (S. 490). See H.R. Rep. 96-311, 96th Cong., 1st Sess. 7 (1979); S. Rep. 96-179, 96th Cong., 1st Sess. 2, 7 (1979).

Federal Rules of Criminal Procedure required that petitioners be prosecuted "in a district in which the offense was committed." But, under Rule 18, a defendant may be tried anywhere within that district and has no right to one location over another. *United States* v. *James*, 528 F. 2d 999, 1021 (5th Cir. 1976), cert. denied, 429 U.S. 959 (1977); *United States* v. *Fernandez*, 480 F. 2d 726, 730 (2d Cir. 1973). Since New Mexico constitutes only one judicial district and is not further separated into divisions (28 U.S.C. 111), petitioners' prosecution was properly initiated in Albuquerque, and they had no right to be tried in Las Cruces instead.

3.*a.* Petitioners contend (Pet. 8-10) that the prosecutor deliberately withheld evidence that bore on the question whether archaeological sites 250 and 251 (where petitioners appropriated the artifacts) were on federal land. But before trial petitioners were told the exact geographic location of the two sites in response to their motion for a bill of particulars and were also given a xerox copy of a United States Geological Survey map of the area within the Gila National Forest that included the two sites. Petitioners argue (Pet. 9) that they should also have received, prior to trial, a copy of a map containing arrows and markings made by a government land surveyor, which was introduced at trial to indicate to the court the precise location of the sites.[4] Those markings, however, do not constitute, as petitioners contend, "scientific tests or experiments" discoverable under Fed. R. Crim. P. 16(a)(1)(D). Nor was the government obligated to furnish petitioners with a summary of the

[4]Petitioners' claim that the government altered the map furnished them, rather than altering by subsequent markings the map that was introduced at trial, is substantiated neither by the record nor by any logical reasoning.

anticipated testimony of the government's witness as to the location of the sites. Fed. R. Crim. P. 16(a)(2); *United States* v. *Krohn*, 558 F. 2d 390, 394 (8th Cir.), cert. denied, 434 U.S. 868 (1977); *United States* v. *Mitchell*, 540 F. 2d 1163, 1166 (3d Cir. 1976), cert. denied, 429 U.S. 1099 (1977).

b. Soon after his parked truck was discovered and seized by federal officers near the archaelogical sites, petitioner May reported to one of the rangers that, while he had been scouting for deer, his truck had been stolen (Tr. 41). Petitioners now contend (Pet. 10) that the government deliberately withheld that statement prior to trial. However, petitioner May's voluntary and unsolicited report to the government, which was not transcribed or signed, is not a statement "in response to interrogation by any person known to the defendant to be a government agent," as specified by Fed. R. Crim. P. 16(a)(1)(A). *United States* v. *Green*, 548 F. 2d 1261, 1267 (6th Cir. 1977). The government was therefore not required to disclose the statement to petitioners before trial. Moreover, the statement did not bear directly on any issue of guilt or innocence, and its pre-trial disclosure would not have affected the outcome of the trial. *Brady* v. *Maryland*, 373 U.S. 83 (1963). See *United States* v. *Agurs*, 427 U.S. 97, 112-114 (1976). There is thus no basis for further review of petitioners' claim.

c. Petitioners contend (Pet. 10-11) that statements and physical evidence introduced at trial were impermissibly obtained from them by threats and promises made by a government agent. Petitioners' claims, however, were disputed in a pre-trial proceeding by Wydler Dresser, a special agent with the United States Forest Service, who testified that he had read aloud the waiver of rights form and advised petitioners of their *Miranda* rights before

taking statements from them. Agent Dresser also denied that he had threatened either petitioner with additional or more severe charges if they refused to cooperate or that he had promised leniency in exchange for their statements (Dec. 6, 1977, Tr. 30-35). Agent Dresser's testimony was substantiated by petitioner Smyer, who testified that the agent had refused to predict what sentence they might receive and that he and Agent Dresser discussed petitioner's *Miranda* rights and that petitioner Smyer understood them before he signed the waiver form and gave his statement (Dec. 6, Tr. 20-22).[5] In these circumstances, the court of appeals correctly held (Pet. App. A6) that the district court did not err in concluding that Agent Dresser did not coerce or threaten petitioners. This factual determination does not warrant further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1979

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[5]Both petitioners signed the waiver form (Gov't Exhs. 14, 15).